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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER, 1971

No. A-953

W. R. BEAN & SON, INC.

Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable Justices of the Supreme Court:

Petitioner, W. R. Bean & Son, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the instant case.

Opinions Below

The opinion of the Court of Appeals for the Fifth Circuit is reported at 450 F.2d 93. The opinion of the National Labor Relations Board is reported at 185 N.L.R.B. No. 81. Copies of said opinions and the Judgment of the Fifth Circuit are appended hereto. (Apendixes "A", "B" and "C").

Jurisdiction of the Court

Jurisdiction to review the said judgment by writ of certiorari is invoked under 28 U.S.C. §1254 (1). The pertinent dates are:

October 27, 1971: Judgment of the United States Court of Appeals for the Fifth Circuit.

November 18, 1971: Judgment of the United States Court of Appeals for the Fifth Circuit entered.

November 30, 1971: Petition for Rehearing filed with the Fifth Circuit Court of Appeals.

January 12, 1972: Petition for Rehearing denied.

March 16, 1972: Order Extending Time to File Petition for writ of certiorari until May 11, 1972, granted.

April 24, 1972: Order Extending Time to File Petition for writ of certiorari until May 11, 1972, granted.

Questions Presented for Review

1. Can there be a violation of Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C., Sec. 151, *et seq.*, (hereinafter, the Act) without a showing of both discrimination and motivation for discrimination which is aimed at achieving the prohibited effect?

2. Assuming that there is some evidence of discrimination on the record, what degree of unlawful motive is required to establish a violation of Section 8(a)(3) of the Act?

3. Where there is some evidence of fraud having been perpetrated on the National Labor Relations Board (hereinafter, the Board) by the alleged dis-

criminatee and the labor organization involved (the underlying facts of which would *inter alia* divest the discriminatee of "employee" status under the Act) was the courts sustaining of the Board's denial of both Petitioner's motions and application for discovery and the Board's subsequent refusal to receive and consider competent and material evidence with respect to such matter a denial of due process of law?

Statutes Involved

The National Labor Relations Act, 29 U.S.C. 151, *seq.* provides, in pertinent part, as follows:

UNFAIR LABOR PRACTICES

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization...

Sec. 10(b) Wherever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the

serving of said complaint: . . . Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, Secs. 723-B, 723-C).

Pertinent sections of the Board's Rules and Regulations, Series 8, as amended (29 C.F.R. §102.30 - 102.32) are set forth in Appendix "D" hereto.

Statement of the Case

I.

Summary of facts

As a result of an uncontested Board order in 1966,[1] Company reinstated Rose Holmes. She was reinstated to her position as a regular, part-time employee whose primary function was to work on Sundays and Mondays to produce Company's printing of *Time* magazine, and report at such other time during the week as she might especially be called therefor (A. 176,177).[2]

By 1968, Holmes was acquiring a record for absenteeism. About June 2, 1968, Holmes received a verbal warning because of excessive absenteeism, which set forth her number of absences from the period of February through June of that year, the rate of absenteeism, and a warning that a continuance of that rate of

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[1] W. R. Bean & Son, Inc. 158 N.L.R.B. 712 (1966).

[2] "A" references are to the Appendix filed with the Court of Appeals for the Fifth Circuit.

absenteeism would result in termination (A. 328). In August, 1968, she was called into an office where she was again warned about her absenteeism and told that her absenteeism was the reason that she was not being considered for "regular" (full-time) employment (A. 101, 246). Again on November 19, 1968, Holmes received still another written warning for excessive absenteeism, which recounted her absences, including in particular those on Sundays and Mondays (her regular days of employment), recited the verbal warning of August 12, 1968, and warned her that if her attendance did not improve she would be discharged (A. 329). Holmes would have been discharged at this time for absenteeism except for the pendency of a union[3] representation matter in which she had participated. Additionally, supervisors of the Company accorded her favored status because of her reinstatement pursuant to the Board order (A. 161, 249). The representation matter was finally concluded when on February 25, 1969,[4] the Board certified that the union had won the election.

In the meantime, on January 7, according to the Company's records and witnesses, Holmes received another verbal warning for absences (A. 339, 347).[5]

Following the Union's certification, the Company and the Union began negotiations. Two or three employees, including Holmes, became employee representatives on the Union bargaining committee, which was chaired variously by the Union's International representative,

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[3] The union involved was Atlanta Bookbinder's and Bindery Women's Union, AFL-CIO, Local 96, hereinafter referred to as "Union".

[4] Dates referred to will be 1969 unless otherwise indicated.

[5] While Holmes denied receiving (could not recall) this warning the Board appears to credit the actuality of this warning.

local president, and another representative who was n an employee of the Company.

On March 13, Holmes' mother passed away. Follow ing this tragedy Holmes was absent, according to th Company's records, for only two regularly schedule work days during the week ending March 22 (A. 23

On April 11, the Company and the Union met in bargaining session at which Holmes and several othe employees of the Company were present (A. 31).

On April 20, Holmes was notified at work of the deat of her son in an automobile accident and left work wit her supervisor aware of this tragedy. From the tim Holmes left the Company's plant on April 20 until th decision was made to discharge her on May 16, Holme did not return to work. During this period, at Holme instigation, employee Vi Davis, sometime between Ma 5 and 11, talked to the Company's foreman, Baker, co cerning a possible shift change for Holmes when sh should return to work. Baker checked with his supe visor, Carter, concerning this and, several days late reported back to Davis that Holmes would have to tal this up with Carter upon her return (A. 277-279).

Baker's inquiry to Carter concerning the possibl shift change for Holmes prompted Carter to ask Bake just when Holmes was planning to return to work an whether Baker had heard from Holmes. Baker replie that he had not heard from Holmes and did not kno when she was going to return to work. Carter the stated that he and Baker should look at Holmes' recor to see when she had last been at work (A. 264, 265 The examination revealed that Holmes had not been work since April 20, and Carter then told Baker th Holmes had already been out too long—her absenc had far exceed permissible limits—and that somethin

had to be done. Baker, mentioning Holmes' tragedy, recommended that they give Holmes one week by waiting to see whether she reported to work on her normal work days, the forthcoming Sunday and Monday. Carter agreed (A. 251-252, 277-279).

Holmes, however, did not report for work on the following Sunday or Monday, again without notice; whereupon Carter approached Baker and asked him whether Holmes had reported for work or whether he (Baker) had heard from her. When Baker replied "no" to both inquiries, Carter, aware of Holmes' status as a "special case" then reported the situation to the Company's Vice President Campbell on Tuesday, May 13 (A. 161). Campbell then directed Carter to review the entire matter, including Holmes' record, and report back to him so that some decision could be made (A. 161, 252, 253, 279).

Two days later, on May 15, to the surprise of Campbell, Holmes appeared at a bargaining session.

The following day Carter and his then immediate superior, Farry, had, pursuant to Campbell's instructions earlier that week, finished reviewing Holmes' employment records, and on their own initiative went to Campbell's office to present the records and their recommendations that Holmes be discharged. Campbell also reviewed Holmes' records and saw first-hand its excessiveness in absences—"far worse than any other employee we had" (A. 165). Campbell, with Carter and Farry present, then telephoned the Company's counsel, reviewed the facts, and got concurrence in their decision to discharge Holmes (A. 161-165, 167, 172, 209, 253).

Foreman Baker was notified of this decision and was told to inform Holmes of her discharge if she reported for work on Sunday or Monday, May 18 or 19 (A. 281). This procedure was in accordance with the Company's normal policy with respect to part-time employees in such circumstances (A. 175). Holmes, however, did not report for work on either May 18 or 19, so on May 19 Campbell directed that termination and separation notices be prepared for Holmes and a check prepared for the vacation pay due her (A. 172, 174, 175; 309, 310, 348). When prepared, the documents were turned over to Foreman Baker to give to Holmes should she report on Sunday or Monday, May 25 or 26 (A. 174-175).

On May 23, The Company and the Union met for another negotiation session. Prior to the beginning of the session, the Company's attorney called the Union representatives aside to object to the presence of Holmes on the bargaining committee. The objection was based on the fact that Holmes had been discharged, according to the Company (or was being considered for discharge according to the Board's finding). As it developed, Holmes did not appear for the bargaining session but, at that time, was on a trip somewhere in Alabama (A. 177-179).

When Holmes did not report for work on either May 25 or 26, Baker returned the separation papers to Campbell's office and Campbell directed his secretary to mail them to Holmes. This was done within a day or so, on May 28 (A. 312). On May 29, the Company and the Union had another bargaining session at which Holmes appeared. The Company again raised objection to Holmes' presence as she was no longer an employee. At that time Holmes had not yet received the notice to

that effect but received the separation notice in the mail that same afternoon. (A. 309-310; 374-375).

II.

Proceedings before the National Labor Relations Board

The proceedings before the Board grew out of charges filed on July 22, 1969, by the Union. A Complaint issued on August 22, 1969, and a hearing was held in Atlanta, Georgia, on December 9 and 10, 1969. The sole allegation in the Complaint was the alleged discriminatory discharge of Holmes.

While preparing for the trial of this case, the Company came on evidence tending to show that Holmes was not a *bona fide* employee within the meaning of the Act. If supported, such evidence would stand as a complete defense to the allegation in the Complaint. Because of this, the Company on September 19, 1969, initiated pre-hearing discovery measures including interrogatories to the Regional Director of the Board and to the Charging Party and a *subpoena duces tecum* to the Charging Party.

At the trial, the Company renewed its pre-trial motions with respect to the depositions and subpoena to the Charging Party setting forth the grounds therefor (A. 288-293). These motions were overruled by the Trial Examiner.

Also during the hearing, the Company sought to offer certain newly discovered evidence which it did have tending to show that Holmes was not a *bona fide* employee under the Act and therefore not entitled to its protection; that fraud and possible perjury had

been perpetrated on the Board; and that Holmes had, in fact, quit her job with the Company—all defenses to the Complaint. All such offers of evidence were denied by the Trial Examiner (A. 113-116, 128-129, 293).

On May 14, 1970, the Trial Examiner's Decision issued, in which the Trial Examiner found that the Company had discharged Holmes in violation of Section 8(a)(3). Thereafter, the Company filed appropriate exceptions and brief with the Board. The Board affirmed without discussion the findings, conclusions, and recommendations of the Trial Examiner (Appendix "C").

Jurisdiction of the Court of First Instance

This case was before the United States Court of Appeals for the Fifth Circuit upon the application of the Board, pursuant to Section 10(e) of the Act, as amended, for enforcement of its order issued against Petitioner on September 14, 1970.[6] The Court of Appeals for the Fifth Circuit had jurisdiction of the proceeding by virtue of the alleged unfair labor practice having occurred in Atlanta, Georgia, where Petitioner is engaged in the printing and sale of commercial printing paper. No jurisdictional issue was presented below.

Reason for Granting the Writ

The decision below conflicts with decisions of this Court and with decisions of other Courts of Appeals and such conflicts involve substantial and recurring questions of law.

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[6] After briefs were filed with the court below, the Petitioner was denied oral argument in this case by virtue of the court's placing the case on its Summary Calendar pursuant to Rule 18, 5th Circuit

I.

Necessity of discrimination as an element of a Section 8(a)(3) violation

This Court has unequivocably stated the test for a Section 8(a)(3) discharge. In *Radio Officers Union v. N.L.R.B.*, 347 U.S. 21, 42-43 (1954) this Court said:

> The language of §8(a)(3) is not ambiguous. The unfair labor practice is for an employer to encourage or discourage membership by means of discrimination. This section does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accomplished by discrimination is prohibited.

No where in the opinion of the Court of Appeals (nor, in fact, in that of the Board or its Trial Examiner) is there a discussion or finding of the fact of discrimination. Moreover, the record is replete with uncontradicted, substantial, and apparently credited evidence establishing affirmatively that there was in fact no discrimination against Holmes.

With regard to the latter point, the record shows as follows:

1. Holmes had the worst absentee record of all the Company's employees—"far worse than any other employee . . ." (A.165). In 1968, Holmes was absent in excess of 42 percent of the time for which she was primarily hired. In 1969, up until the time Holmes was discharged, she was absent 60 percent of the time for which she was primarily hired to work (A. 339, 343, 345). There is also no evidence that the Company had ever condoned such absenteeism on the part of any other employee.

2. Holmes, prior to her discharge for absenteeism, had been disciplined with regard to her excessive absenteeism on four occasions. She was verbally warned about her excessive absenteeism on three occasions—June, 1968; August, 1968; and January 7, 1969. Moreover, on November 19, 1968, she received a written disciplinary warning informing her that if her attendance did not improve she would be discharged (A. 329).

3. The Company (through Supervisor Carter) initiated an inquiry into Holmes' attendance record to find out when she had last been at work (A. 264, 265). Carter, aware of Holmes' status as a "special case" (reinstated by Board order) reported her absence, over three weeks at that time, to the Company's Vice President Campbell (A. 161). Uncontradicted evidence affirmatively showed that only her long, unexplained absence from work sparked this inquiry by Supervisor Carter.

4. Holmes was absent from her job for a period of *four weeks* prior to her disciplinary discharge (A. 252, 278).

5. The Company's Vice President Campbell, who later made the decision to discipline Holmes, directed the review of Holmes' absentee record *two days prior* to her appearance at the union bargaining session on May 15, 1969 (A. 161, 252). Furthermore, Campbell reviewed this absentee record prior to making his final decision to take disciplinary action (A. 161-165, 167, 172, 209, 253).

Failing, as noted, to discuss or make any findings in respect to the fact of discrimination, and with the record devoid of evidence of discrimination, the Court of Appeals' opinion constitutes a holding that discrimina-

tion is no longer the *sine qua non* for a violation of Section 8(a)(3) of the Act. This holding, of course, is in direct conflict with the long established rule of this Court which makes discrimination the touchstone of the violation of Section 8(a)(3). *Radio Officers Union v. N.L.R.B., supra.*

Whether reviewed in light of the record or whether the opinion itself is analyzed, it is difficult to determine whether and how this necessary element of discrimination is accounted for; but it appears that if the Court of Appeals considered this element, it did so by inferring the discrimination from factors of only incidental significance. The Court stated that "[t]here is evidence to support the conclusion that the decision to discharge Holmes was made by Vice President Campbell the day after he was shocked to see her attend and participate in a Union negotiation session on May 15, 1969, while she was on extended leave of absence, excused by her foreman as a result of two tragic deaths in her immediate family in little over a month's time."[7]

This statement by the Court is possibly an implied finding that the timing of the discharge (i.e., coming

[7] The Court's attention is invited to two uncontradicted facts regarding the referred to tragedies, neither of which was treated by the Board or the Court of Appeals: Neither on May 15 at the referenced bargaining session nor until after Vice-President Campbell's giving of final approval to the recommendations that Holmes be discharged did he know of the death of Holmes' son (the second tragic death); and while Campbell's subordinate, Supervisor Carter, knew of both deaths, there was no suggestion, in evidence or in the Board's and the Court's findings, that Carter's recommendation that Holmes be discharged because of excessive absenteeism was motivated to discourage her or other employees' union activity. Indeed, such as can be discerned from the decisions below, it appears that the so-called "motivation" was Holmes' appearance at a bargaining session, a thing in which Carter had no participation or concern.

a day or so after Holmes' appearance at the bargaining session) infers discrimination.

First, it is to be noted that Holmes' appearance at the bargaining session is significant not because it preceded her discharge but rather for the reason that Holmes appeared at the meeting while on an "extended" leave of absence, as she contended,[8] or during her unexcused absence from work as the Company contended. In either instance, the purpose of the meeting and the fact that it was between the Company and the Union are significant only with regard to Holmes' participation in an activity (such as collective bargaining) *inconsistent* with her extended absence from work at a time of alleged emotional strain. Thus, to base a finding of inferred discrimination upon the timing of the decision to discipline Holmes creates a conflict between the decision of the Fifth Circuit in the instant case and the Eighth Circuit in *Osceola County Co-op Creamery Association v. N.L.R.B.*, 251 F.2d 62 (1958), which quotes from *N.L.R.B. v. Citizen-News Co.*, 134 F.2d 970, 974, as follows:

> The fact that a discharged employee may be engaged in labor union activities *at the time* of his discharge, taken alone, is no evidence *at all* of a discharge as the result of such activities . . . (Emphasis added)

Furthermore, the Fifth Circuit has allowed Holmes' participation in this incidental union activity to become,

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[8] **This so-called leave of absence, if found to have been granted by Holmes' immediate supervisor, Foreman Baker, was not known—as shown by uncontradicted, credited evidence by those who made the decision to discharge her, *i.e.*, Carter, Farry and Vice-President Campbell.**

in effect, a shield granting to her *preferred status* as an employee. This holding, too, is in direct conflict with the decision of the Sixth Circuit where in *N.L.R.B. v. Bangor Plastics, Inc.*, 392 F.2d 772, 777 (1967), the Court holds:

> Union membership and activities is not a shield behind which a discharged employee can take refuge and claim discrimination. [Citations omitted.] The burden remains upon the General Counsel to prove that the reason for the discharge was the employer's anti-union hostility. An employer is not obliged to treat a union member differently or with greater deference than any of his other employees. *Poor performance, misconduct and insubordination, for example, do not have to be tolerated merely because the offenders are among the plant's most active union supporters.* (Emphasis added)

Finally, the Court of Appeals in the instant case states that "[t]he record discloses that the decision to discharge Holmes was made without notifying her that the Company expected her to return to work or without warning her that she would be discharged if she did not return." Even if this Court disregards the fact that there is no evidence in the record to establish that these practices were anything other than the usual policies of the Company, such a statement of the Court of Appeals is in clear conflict with the decision of the Eighth Circuit in *Osceola County Co-op Creamery Association v. N.L.R.B., supra.* The Fifth Circuit appears to suggest that following Holmes' appearance with the bargaining committee, the Company should have warned her that she would be discharged if she did not

return to work. Thus, it can only be surmised that had the Company reduced the *quantum* of discipline and only warned Holmes following her appearance at the bargaining session, the Company's action would not have been discriminatory. Such a holding makes the *quantum* of discipline a matter for the Board.

The Eighth Circuit has ruled otherwise:

> . . . The decision of whether or not to discharge an employee is up to management. In *N.L.R.B. v. Montgomery Ward & Co., Inc.*, 8 Cir., 157 F.2d 486, 490, this court states: "***In considering the propriety of these discharges the question is not whether they were merited or unmerited, just or unjust, nor whether as disciplinary measures they were mild or drastic. These are matters to be determined by the management, the jurisdiction of the Board being limited to whether or not the discharges were for the union activity or affiliations of the employees. *Osceola County Co-op Creamery Association v. N.L.R.B., supra*, at 65.

This Court should grant certiorari and reverse the holding below because it is in conflict with clear holdings of this Court as to discrimination, or decide whether there can be a violation of Section 8(a)(3) of the Act without substantial evidence of the fact of discrimination. Also, this Court should decide whether an employee's poor job performance, excessive absenteeism, or misconduct has to be tolerated (i.e., guarantee the union activist immunity from industrial discipline) simply because the employee is engaged in incidental protected activity, and, furthermore, whether the quantum of discipline for such poor performance, etc., is properly a matter within the jurisdiction of the Board.

II.

Necessity of unlawful motive as an element of a Section 8(a)(3) violation

Similar to the clarity of its pronouncements as to discrimination, this Court has also made clear pronouncements with respect to the element of unlawful motivation. In *Textile Workers Union v. Darlington Manufacturing Company*, 380 U. S. 265, 276 (1965), this Court stated:

> We have heretofore observed that employer action . . . does not amount to a violation of §8(a)(3) in the absence of a showing of motivation which is aimed at achieving the prohibited effect [discrimination to encourage or discourage membership in a labor organization].

Thus, for there to be a finding of unlawful discharge under the Act, there must be *both* substantial evidence of discrimination and of unlawful motivation.

Here again, the opinion of the Fifth Circuit neither discussed nor made a finding with respect to unlawful motivation, and the record is devoid of substantial evidence in this regard. This failing by the Court of Appeals is, therefore, in direct conflict with the decisions of this Court.

Even assuming, however, that the Fifth Circuit considered the element of illegal motive (although not treated in its opinion), the decision of the Court of Appeals on this issue is also in conflict with the decisions of the First Circuit.

The Fifth Circuit in the instant case appears to have inferred illegal motive from the fact that Holmes "was an active union adherent and organizer who had been

previously discharged for union activity and reinstated by the Board"[9] and from her being present at bargaining session just prior to the time that the Company finalized its decision to discharge her; for, there was no other evidence from which to infer unlawful motive, *e.g.*, no admissions of guilt or statements of illegal motive by the Company, no pattern of unreasonable treatment, no unlawful threats, no unlawful promises, no unlawful surveillance and no interrogation of employees concerned in union activities. There was, moreover, no relevant or material evidence of general anti-union animus, and, particularly, there was nothing in the record even to suggest that the Company had any intention to discharge Holmes because of her union activity.[10]

If indeed, therefore, the Fifth Circuit did consider the matter of unlawful motive in the instant case, the most that it did in this regard was to follow its prior decisions. Such decisions, if not in conflict with each other, are in conflict with the holdings in this regard of the First Circuit.

In *N.L.R.B. v. Whitfield Pickle Company*, 374 F.2d 576, 582 (5th Cir., 1967), the court stated:

> To invoke § 8(a)(3), the anti-union motive need not be dominant (i.e., larger in size than other

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[9] Inasmuch as Holmes' union activity and reinstatement were known and uncontested facts, it is difficult to see what relevance the Court's recitation of these facts has, unless, to further support the Company's contention that her acivity and reinstatement acted as a shield. *N.L.R.B. v. Bangor Plastics, Inc., supra.*

[10] In fact, the Company, while it felt that practicalities restrained it from (lawfully) discharging Holmes for excessive absenteeism in 1968, nevertheless, later wistfully commented that she might improve in her attendance, thus affirmatively evincing no unlawful motive (A. 249).

motives); in some cases it may be so small as the last straw which breaks the camel's back. We reiterate that all that need be shown by the Board is that the employee would not have been fired but for the anti-union animus of the employer. We therefore do not hold that in this case the general counsel must have shown "dominant" motive.

The Fifth Circuit has also said in *N.L.R.B v. O. A. Fuller Super Markets, Inc.*, 374 F.2d 197, 200 (1967):

> Only if the Board adequately sustains its burden of producing evidence on the record as a whole which establishes a reasonable inference of *causal connection* between the employer's anti union motivation and the employee's discharge can its order properly be enforced. (Emphasis added).

See also, *Nix v. N.L.R.B.*, 418 F.2d 1001 (5th Cir., 1969); *N.L.R.B. v. Winn-Dixie Stores, Inc.*, 410 F.2d 1119 (5th Cir., 1969).

In direct conflict with these Fifth Circuit cases, the First Circuit, however, has only recently restated its position that in Section 8(a)(3) cases the Board has the burden of making a clear showing that the employer's *dominant motive* was not a proper business one, but, rather, union animus. In *N.L.R.B. v. Fibers International*, ... F.2d ....., 76 LRRM 2798, 2799 n. 1, (1971), the court states:

> So that there may be no misunderstanding about what we mean by dominant motive, we state it again. Regardless of the fact that enforcing the penalty may have given the employer satisfaction because of the employee's union activities, the burden is on the Board to establish that the penalty

would not have been imposed, or would have been milder, if the employee's union activity, or a union animus, had not existed.

Accord, N.L.R.B. v. Agawam Food Mart, Inc., 424 F.2d 1045 (1st Cir. 1970); *N.L.R.B. v. Gotham Industries, Inc.*, 406 F.2d 1306, 1309 n.5. (1st Cir. 1969); *N.L.R.B. v. Billen Shoe Co.*, 397 F.2d 801 (1st Cir. 1968).

This Court should grant certiorari and reverse the holding below because it is in square conflict with the holdings of this Court with regard to unlawful motivation, or decide whether there can be violation of Section 8(a)(3) of the Act without substantial evidence of unlawful motivation. Also, assuming that there must be substantial evidence of illegal motive for there to be a finding of unlawful discharge, this Court should resolve whether the Board has the burden of proving only a *causal connection* between the employer's anti-union motivation and the employee's discharge or whether the Board has the burden of proving that the *dominant motive* behind the discharge was anti-union animus.

III.

Petitioner has been denied due process of law

Following the issuance of Complaint in the instant case, the Company, in preparing for trial, came on evidence tending to show that Holmes was not a *bona fide* employee within the meaning of the Act at the time of her original discharge in 1965 and that there was fraud or collusion perpetrated on the Board before and during the 1965 trial which led to the decision to reinstate her. If either of these facts (lack

of employee status or fraud) could have been presented to and proved before the Board, Holmes would have been shown not to have been entitled to the protections of the Act in either the 1965 case or the instant case. *N.L.R.B. v. Brake Parts Company*, 447 F.2d 503 (7th Cir., 1971); *Iowa Beef Packers Inc., v. N.L.R.B.*, 331 F.2d 176 (8th Cir., 1964). Similarly, the Company came on evidence tending to show that Holmes had quit her employment before the alleged unlawful discharge in May, 1969, so that she could not in fact have been discharged.

Because of this newly discovered evidence, the Company sought prehearing discovery as provided for in the Board's rules at 29 C.F.R. §§102.30—102.32 (Appendix "D"). The Board denied the Company this discovery. The Company renewed these efforts at the hearing and, further, offered evidence in support of these particular defenses to the Complaint. The Trial Examiner, however, again denied the Company's motions for discovery and barred further offers of proof concerning these defenses of the Company (A. 293).

It is in this context that the Fifth Circuit held in the instant case:

> Although the Board's rules at 29 C.F.R. §§ 102.30-102.32 and Section 10(b) of the Act [Court's footnote omitted] appear to give the Trial Examiner the authority to permit pre-hearing discovery in any case where such procedures would be practicable or necessary to the adjudication of the issues in the case, *N.L.R.B. v. Safway Steel Scaffolds Co. of Georgia*, 383 F.2d 273 (5th Cir. 1967), cert. den. 390 U.S. 955 (1968); *N.L.R.B. v. Miami Coca-Cola Bottling Company*, 403 F.2d 994 (5th

> Cir. 1968) it is within the discretion of the Trial Examiner to grant or deny discovery procedures. *Safway Steel Scaffolds Co., supra.* In this case it does not appear that the Trial Examiner or the Board abused their discretion in refusing to permit the Company discovery in order to find evidence of fraud in connection with the uncontested Board proceeding five years earlier. Nor does it appear that the Examiner or the Board erred in limiting the evidence at the hearing to the events and circumstances surrounding the 1969 discharge. Any possible technical error in denying discovery and the introduction of evidence regarding the earlier discharge was not prejudicial to the Company's case.

On its face, the Fifth Circuit's holding is a denial of due process. Even were it not, there is a conflict between this decision and other decisions of the Court of Appeals for the Fifth Circuit and the decisions of the Court of Appeals for the Second Circuit in *N.L.R.B. v. Interboro Contractors, Inc.*, 432 F.2d 854 (1970) and the Court of Appeals for the Eighth Circuit in *N.L.R.B. v. Burns*, 207 F.2d 434 (1953) on the same matter.

The Second Circuit has only recently held in *N.L.R.B. v. Interboro Contractors, Inc., supra*, at 858-859, that the Trial Examiner has no authority to permit pre-trial discovery:

> The Administrative Procedure Act contains no provision for pre-trial discovery in the administrative process, and our research discloses no federal agency which gives litigants the right to prehearing discovery in proceedings before it.

We are not persuaded by the contrary position taken by the Fifth Circuit. In N.L.R.B. v. Safway Steel Scaffolds Co. of Georgia, 383 F.2d 273 (5th Cir.), cert. denied 390 U.S. 955, 88 S.Ct. 1052, 19 L.ed.2d 1150 (1967), and N.L.R.B. v. Miami Coca-Cola Bottling Co., 403 F.2d 994 (5th Cir. 1968), it stated that Rule 102.30 does provide for pre-hearing discovery . . .

Section 10(b) of the Act provides that Board proceedings, where "practicable," shall be conducted in accordance with the "rules of evidence" applicable in the federal district courts. On its face this amendment regulates the introduction of evidence at Board hearings, without imposing on the Board any particular pre-trial procedures—such as discovery—which do not by any standard constitute rules of evidence.

Furthermore, the Fifth Circuit's approval of the Board's action of refusing to receive the evidence of fraud is in clear conflict with a related decision of the Court of Appeals for the Eighth Circuit. In *N.L.R.B. v. Burns, supra.* at 436, the Court states:

In Donnelly Garment Co. v. National Labor Relations Board, 8 Cir., 123 F.2d 215, 224, this Court said:

"That a refusal by an administrative agency such as the National Labor Relations Board to receive and consider competent and material evidence offered by a party to a proceeding before it, amounts to a denial of due process is not open to debate. *** that the Board would or might have reached no different conclusion had the rejected evidence been received, is entirely beside the point. The

> truth is that a controversy tried before a court or before an administrative agency is not ripe for decision until all competent and material evidence proffered by the parties has been received and considered. [Citations omitted]"
>
> What was said in that case was a correct statement of the law.

The significance of the holding of the Fifth Circuit in the instant case cannot be overstated. The Court on one hand stated that there was no abuse of discretion when the Board refused to allow all *pre-hearing* discovery by the Company (in effect, reserving such matter for the hearing), yet, on the other hand, held that there was also no abuse of discretion in refusing to receive and consider *during the hearing* competent and material evidence offered by the Company on the same matters for which pre-hearing discovery was requested but denied—matters which could have been complete defenses against the Complaint. When pre-hearing discovery was not allowed, the Company could only discover and perfect this evidence by being permitted to inquire into and present evidence on these matters at the hearing of the case.

This Court should decide whether the Trial Examiner has the authority to permit pre-hearing discovery; whether such authority (if existing) is discretionary; whether the Trial Examiner can refuse to receive and consider relevant and material evidence regarding the fraudulent and obusive conduct, and the very status of the parties and person using Board processes and claiming the protection of the Act; and whether such arbitrary refusal is, on its face, a denial of due process of law.

IV.

Issues involve important questions of federal labor law.

The conflicts set forth above involve substantial, recurring, and therefore important questions of federal labor law. The staggering case load of the Board with the resultant impact on the Courts of Appeals demonstrates this.[11]

For a number of years, the Board has had, by far, more cases in the Courts of Appeals than any other government board or commission. For fiscal 1969, of 1345 cases for all boards and commissions in the Courts of Appeals, the Board had 629, or 46.8 percent of them. According to the Board's latest published annual report, it had 9,290 charges alleging violations of Section 8(a)(3), representing more than two-thirds of its total charged case load involving alleged employer (Section 8(a)) violations. Over a thousand of these resulted in the issuance of complaints alleging 8(a)(3) violations. During fiscal 1970, the Courts of Appeals handed down decisions in 322 cases on petitions for review and/or enforcement, 283 of which involved alleged employer violations, with apparently about two-thirds of these involving Section 8(a)(3) violations.

Compounding this is the Board's increasing case load. For the three-month period ending March of this year, the Board received a total of 7,487 unfair labor practice charges, for a 26 percent increase over the same period

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[11] Sources of the data here cited are: Division of Information, National Labor Relations Board; "Thirty-Fifth Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1970"; and "NLRB Statistical Summary for the Three-Month Period January Through March 1972," dated May 23, 1972.

of the last year. At the end of March, 1972, there were 482 unfair labor practice cases pending decision by the Board members. A Board news release states:

> The January-March period [1972] increase, extending an uninterrupted rise of several years in overall cases brought to the N.L.R.B., contrasted in makeup from the caseload of the two quarterly periods beginning with the fiscal year last July 1. In both the January through September and the October through December quarters filings of unfair labor practice charges were substantially greater .... The five-Member Board issued formal decisions in 207 unfair labor practice cases ... an increase of 17 percent from ... the same quarter a year earlier .... [T]he General Counsel [of the Board] issued 693 formal complaints, setting the cases for trial .... an increase of 14 percent over the three month [period of] a year ago .... In litigation of complaint cases, N.L.R.B. trial examiners conducted 277 hearings ... [of the total cases pending of all types at various procedural levels] at the end of March, 1972, charges of unfair labor practices accounted for 9,885 cases ....

Thus, a demonstrated history of a substantial number of cases involving Section 8(a)(3) violations alone in the Courts of Appeals, together with an ever increasing Board case load with its consequent increased impact of 8(a)(3) violations in the Courts of Appeals, make evident the importance of the questions raised herein, and the need for this Court to settle these questions by authoritative and clear pronouncements.

Moreover, the discovery - due process issues raised

herein would increase the significance of the foregoing by another third in terms of overall employer unfair labor practice cases, and, apparently, by another approximately 34 percent when union unfair labor practices are included.

Finally, the decision below—even if it were assumed that it involved no conflicts with the decisions of this Court and the decisions of other Courts of Appeals—is clearly erroneous. The record, when reasonably and knowledgeably viewed, leads inescapably to the conclusion that there was not only no substantial evidence of either discrimination or unlawful motive [see *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 473 (1951)] but little or none.

Additionally, there was a total refusal below to consider relevant and material evidence regarding probable fraud, collusion, and even perjury. The decision below, moreover, cannot be sustained on any grounds not urged here. Accordingly, the Board's *pro forma* findings and the opinion of the Court of Appeals below have so far departed from acceptable and usual courses of judicial proceedings as to amount to clear error and a denial of due process of law and as to call for this Court's supervision. *Textile Workers Union v. Darlington Manufacturing Company, supra; Radio Officers Union v. N.L.R.B., supra. C. f. The "SS Monrosa" v. Carbon Black Export, Inc.*, 359 U.S. 180 (1959); *Securities and Exchange Commission v. Otis & Co.*, 338 U.S. 843 (1949); *McCandless v. Furlaud*, 296 U.S. 140 (1935). See also, *Garner v. Louisiana*, 368 U.S. 157, 163 (1961); *Thompson v. City of Louisville*, 362 U.S. 199 (1960); *Washington v. United States*, 357 U.S. 348 (1958).

CONCLUSION

For the foregoing reasons the writ of certiorari should be granted.

Respectfully submitted,

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FRANK EVANS SPECHT
ROBERT C. LEMERT, JR.
On the Petition and Brief

APPENDICES

APPENDIX "A"

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 71-1417

Summary Calendar*

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

—v.—

W. R. BEAN & SON, INC.,
Respondent.

APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD (GEORGIA CASE)

(October 27, 1971)

Before GEWIN, GOLDBERG AND DYER,
Circuit Judges.

GEWIN, Circuit Judge: The National Labor Relations Board petitions for enforcement of its order issued against W. R. Bean & Son, Inc. (Company) finding it in violation of Sections 8(a)(1) and (3) of

*Rule 18, 5th Cir. See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 431 F.2d 409, Part I (5th Cir. 1970).

the National Labor Relations Act[1] by its discharge of a single employee, Rosa Ruth Holmes, for engaging in union activity.[2]

The Company challenges the Board's determination as not supported by substantial evidence on the record as a whole and questions the appropriateness of the relief ordered by the Board. The Company further argues that the rulings of the Trial Examiner on discovery motions and evidentiary matters constituted prejudicial error and denied the Company due process of law.

We consider it unnecessary to outline the evidence in detail and therefore make only a brief summary of the facts involved. Holmes was originally employed by the Company in July 1965 and was first discharged that same month. The Board subsequently found that her discharge on that occasion resulted from her activity on behalf of the Atlanta Bookbinders' and Binderywomen's Union, Local 96 (Union). Pursuant to the Board's order[3] Holmes was reinstated as a regular, part-time employee whose primary function was to work Sunday and Monday nights in the Company's bindery.

In February 1969 the Union was certified by the Board as the collective bargaining representative for the Company's employees. During the organizational campaign Holmes distributed union authorization cards and supported the Union's efforts in conversations with fellow employees and at meetings of employees called by the Company. Following the certification,

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[1] 29 U.S.C.A. § 159(a)(1) and (3) (1965).
[2] The Board's decision is reported at 185 N.L.R.B. No. 81.
[3] 158 N.L.R.B. No. 64 (1966).

Holmes was elected as one of three employees to serve on the Union negotiating committee.

On March 13, 1969, Holmes was notified at work that her mother had died unexpectedly. She was excused from work by her foreman, Jerry Baker. The Board found that she remained away from work approximately three weeks. During the period of her absence, Holmes telephoned Baker and told him that she was thinking about returning to work. Baker told her to let him know when she was going to return.

Holmes returned to work in the first part of April. On April 11, 1969, Holmes attended the first Union bargaining session with Company officials and several other employees.

On April 20, 1969, Holmes was notified at work that her son had been killed in an automobile accident and she left work with Foreman Baker's knowledge. Although the evidence is in violent coflict, the Board credited Holmes' testimony that after she had been off for some time as a result of this second tragedy she called Baker and told him that she was still upset and would like to have additional time before returning to work. The Board found that Baker then expressed his understanding and told Holmes to take her time about returning. It is clear that sometime near the middle of May Holmes asked a fellow employee, Violet Davis, to speak to Foreman Baker about a possible change in Holmes' work shift. The Board credited Davis' testimony that Baker told her that he saw no reason why Holmes could not change shifts and that when Holmes got ready to come back to work to report to Superintendent Carter's office and discuss the subject with him.

The second union bargaining meeting was held on May 15, 1969. At that time Holmes had not returned to work, but at the insistence of employee Davis and union representative Crunkleton, Holmes did attend the May 15 meeting. Vice President Campbell testified that he was shocked to see her at the meeting and that following the meeting Vice President Campbell and one of the Company owners discussed their surprise at seeing Holmes at the meeting. According to evidence presented by the Company, the next day Vice President Campbell completed a review of Holmes' absentee record and made the decision to discharge her. The Company claims at the time of the May 15 meeting they had already begun to review Holmes' absentee record with a view toward termination. But nothing was said to Holmes by any Company official during or after the May 15 meeting about her attendance at the meeting or about her not yet having returned to work.

Holmes did not attend the third bargaining meeting on May 23. Although the Company claimed that at this meeting the Union representatives were informed that Holmes had been discharged, the Board credited the Union representatives' testimony that they were told only that Holmes was being considered for discharge. Holmes was not told of this conversation.

Not until the opening of the next bargaining meeting on May 29, 1969 was Holmes informed by the Company that she had in fact been fired. Notice of her discharge dated May 19, 1969 was received by her through the mail when she returned home after the meeting.

There is conflicting evidence regarding the facts and motives surrounding this discharge. The Company

claims that Holmes was discharged because of excessive absences during 1968 and 1969. It argues that actually Holmes was afforded preferential treatment as a Board reinstated employee, and that she was discharged only after a review of her absentee record indicated that it was more excessive than any other employee in the Company.

However the Board concluded that notwithstanding Holmes' record of excessive absenteeism, the Company did not become upset about the absenteeism until she attended the May 15 bargaining session. The Board further found that Holmes' absences in April and May had been excused by Foreman Baker, and concluded that her absenteeism was a pretext for a discriminatory discharge tending to discourage union activity and interfering with the protected rights of employees.

On this record the case would be close no matter in whose favor the Board had found. Upon consideration of the whole record it is our opinion that in this dispute the angels probably stand with neither side.

There is substantial evidence in the record to indicate that Mrs. Holmes was discharged for clearly excessive absences during 1968-69 after having received a number of warnings and that she failed to receive notice of her discharge before the May 29 meeting because she had not even then returned to work.

But there is also evidence in the record that Mrs. Holmes was an active union adherent and organizer who had been previously discharged for union activities and reinstated by the Board and who was now a member of the negotiating committee. The evidence indicates that during the latter part of 1968 Vice Presi-

dent Campbell had reviewed Holmes' record and had decided at that time not to discharge her. There is evidence to support the conclusion that the decision to discharge Holmes was made by Vice President Campbell the day after he was shocked to see her attend and participate in a union negotiating session on May 15, 1969, while she was on an extended absence, excused by her foreman as a result of two tragic deaths in her immediate family in little over a month's time. Further, the record discloses that the decision to discharge Holmes was made without notifying her that the Company expected her to return to work or without warning her that she would be discharged if she did not return. We are therefore of the opinion that there is substantial evidence on the record as a whole to support the conclusion of the Board that Holmes' discharge was discriminatory and interfered with the protected rights of employees under Section 8(a) (1) and (3) of the Act.

Well established rules permit only a very narrow scope of review in agency proceedings limited to a determination of whether the actions and conclusions made by the agency are supported by substantial evidence on the record considered as a whole. *Universal Camera v. N.L.R.B.*, 340 U.S. 474, 95 L.Ed. 456 (1951): 5 U.S.C.A. § 706 (1967). And where, as here, there is substantial evidence to support both the findings of the Board and the contentions of the party seeking review, we must properly defer to the decision of the Board. We may not displace the Board's choice between two fairly conflicting views and inferences, even though the court would justifiably have made a different choice had the matter been before it *de novo*.

N.L.R.B. v. Mira-Pak, Inc., 354 F.2d 525, 527 (5th Cir. 1965).

The Company also claims that even if Holmes' discharge was discriminatory, she was not a *bona fide* employee at the time of her original discharge and reinstatement in 1965. In pursuit of this theory the Company sought discovery in advance of trial and attempted to introduce evidence on the question at the hearing. The Company now contends the Hearing Examiner and the Board erred and deprived the Company of due process of law in refusing to permit discovery concerning this prior case and excluding evidence at the hearing.

Although the Board's rules at 29 C.F.R. §§ 102.30—102.32 and Section 10(b) of the Act[1] appear to give the Trial Examiner the authority to permit pre-hearing discovery in any case where such procedures would be practicable or necessary to the adjudication of the issues in the case, *N.L.R.B. v. Safway Steel Scaffolds Co. of Georgia*, 383 F.2d 273 (5th Cir. 1967), cert. den. 390 U.S. 955 (1968); *N.L.R.B. v. Miami Coca-Cola Bottling Company*, 403 F.2d 994 (5th Cir. 1968) it is within the discretion of the Trial Examiner to grant or deny discovery procedures. *Safway Steel Scaffolds Co., supra.* In this case it does not appear that the Trial Examiner or the Board abused their discretion in refusing to permit the Company discovery in order to find evidence of fraud in connection with the uncontested Board proceeding five years earlier. Nor does it appear that the Examiner or the Board erred in limiting the evidence at the hearing to the events and

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[1] 29 U.S.C.A. § 160(b) (1965).

circumstances surrounding the 1969 discharge. Any possible technical error in denying discovery and the introduction of evidence regarding the earlier discharge was not prejudicial to the Company's case.

The Company further argues that Holmes was part of a devious scheme by the Union to manufacture an incident in an attempt to strengthen its bargaining position with the Company. However there is no evidence anywhere in the record that Mrs. Holmes deliberately concocted a plan to become discharged as a result of her absence from work on the occasions of the death of her mother and her son. This case is therefore clearly distinguishable from *Whittaker Corp. Advanced Metals Technology Division*, 179 N.L.R.B. No. 138 (1969) on which the Company seeks to rely.

The Company's contention that it was misled by the recital in the complaint that Holmes was discharged on May 10, 1969 instead of May 29, 1969 is wholly without merit.

Considering the contentions of the parties and the record as a whole, we find no prejudicial error and we can not say that the findings and conclusions and the scope of relief ordered by the Board are not supported by substantial evidence. Accordingly, the order of the Board is ENFORCED.

APPENDIX "B"

Judgement of Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 71-1417

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

W. R. BEAN & SON, INC.
Respondent.

JUDGMENT

Before GEWIN, GOLDBERG AND DYER,
Circuit Judges.

THIS CAUSE was submitted to this Court upon an application of the National Labor Relations Board to enforce its order dated September 14, 1970, directed against W. R. Bean & Son, Inc., its officers, agents, successors, and assigns. The Court having carefully considered the briefs and transcript of record filed in this cause, determined the case appropriate for summary disposition without oral argument. On October 27, 1971, the Court handed down its opinion granting enforcement of the Board's order against the Respondent.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by the United States Court of Appeals for the Fifth Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that W. R. Bean & Son, Inc., its officers, agents, successors, and assigns, abide by and perform the directions of the Board in said order contained.

Entered: Nov. 18, 1971.

APPENDIX "C"

Opinion of the National Labor Relations Board

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD
WASHINGTON, D. C.
Case No. 10-CA-7868

W. R. BEAN & SON, INC.
and
ATLANTA BOOKBINDERS' AND BINDERYWOMEN'S
UNION, AFL-CIO, LOCAL 96

Robert C. D. McDonald, Esq. of Atlanta, Ga., for the General Counsel.
Frank E. Specht, Esq. of Smith, Currie & Hancock, of Atlanta, Ga., for Respondent.
Morgan C. Stanford, Esq., of *Adair, Goldthwaite, Stanford & Daniel,* of Atlanta, Ga., for the Charging Party.

DECISION AND ORDER

On May 15, 1970, Trial Examiner George L. Powell issued his Decision in the above-entitled proceeding finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and brief, and the entire record in the case, and hereby adopts the findings, conclusions,[1] and recommendations of the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, and orders that the Respondent, W. R. Bean & Son, Inc., Atlanta, Georgit, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommend Order.

Dated, Washington, D. C. September 14, 1970.

John H. Fanning, Member

Gerald A. Brown, Member

Howard Jenkins, Jr., Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

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[1] These findings and conclusions are based, in part, upon credibility determinations of the Trial Examiner, to which the Respondent has excepted. Having carefully reviewed the record, we conclude that the Trial Examiner's credibility findings are not contrary to the clear preponderance of all the revelant evidence. Accordingly, we find no basis for disturbing those findings. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enfd. 188 F.2d 363 (C.A. 2).

TRIAL EXAMINER'S DECISION

Statement of the Case

GEORGE L. POWELL, Trial Examiner: This case, under Section 10(b) of the National Labor Relations Act, as amended, herein called the Act,[1] was tried before me in Atlanta, Georgia. Briefs were filed by the Respondent and the General Counsel on January 27 and 29, 1970, respectively. The complaint, issued August 22, 1969, based upon a charge filed July 22, 1969, presented the question of whether an individual employee, Rosa Ruth Holmes, had been discharged because of her membership in and activites on behalf of the Union, and because she engaged in concerted activities with other employees for the purpose of collective bargaining and other mutual aid and protection or whether she was discharged for cause, namely, excessive absenteeism. Respondent answered denying the alleged unfair labor practice pleading that Holmes was discharged on May 19, 1969 for cause. All parties appeared at the trial, were represented and participated in it and were granted full opportunity to adduce evidence, examine and cross-examine witnesses, submit briefs, and present oral argument.

On the entire record of evidence, my observation of the witnesses as they testified, and on due consideration of the briefs, I find, for the reasons hereinafter set forth, that the General Counsel has established by a preponderance of the evidence that Respondent seized upon excessive absenteeism as a pretext and violated Section 8(a)(1) and (3) of the Act by discharging Rosa Ruth Holmes for her union activities thereby

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[1] 29 U.S.C. Sec. 151, *et seq.*

illegally discouraging membership in the Union. As a remedy for this unfair labor practice, I will recommend that Respondent reinstate Holmes and make her whole for any loss of earnings.

Findings of Fact and Conclusion of Law

I. The Employer and the Labor Organization

I find that the allegations of paragraph 2 and 3 of the complaint, respecting the nature and volume of business carried on by the Respondent, W. R. Bean & Son, Inc., a Georgia corporation engaged in the printing and sale of commercial printing paper in Atlanta, Georgia, is true, and conclude therefrom that Respondent is an employer engaged in commerce within the meaning of Section 2(6) of the Act.

I find and conclude that the Atlanta Bookbinders' and Binderywomen's Union, AFL-CIO, Local 96, herein called the Union or Charging Party, has been at all times material in the complaint a labor organization within the meaning of Section 2(5) of the Act.

II. The Unfair Labor Practices

Holmes had been previously discharged for union activity by Respondent, and, upon issuance of the Board order in the subsequent unfair labor practice proceeding, Respondent had reinstated her with backpay and posted the necessary notice.[2]

The first significant date in this case is March 13, 1969.[3] Holmes was working in the plant on this day when notified that her mother had unexpectedly died.

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[2] Case No. 10-CA-6916, 158 NLRB 712.

[3] All dates are in 1969 unless otherwise noted.

She was excused from work and remained off work for approximately 3 weeks. During this time she called her foreman, Gerald Baker, telling him she was thinking of coming back to work but did not know if she was really about to do so at that time. Baker excused her telling her to let him know when she was coming back. She returned to work in the first part of April. On April 20. Holmes again was working in the plant when notified that her son had been killed in an automobile accident. She again was excused from work and remained off work until she was discharged in May. At some time during this period of absence she telephoned the plant and spoke with her foreman, Baker, telling him that she was still nervous and upset and that if they really did not need her she would like to have some more time off. She credibly testified that Baker told her that he understood her position having experienced a similar tragedy in his family, and he told her to take her time about returning. Also according to Holmes, around the middle of the month of May she asked fellow employee, Violet Davis, to speak to Foreman Baker regarding a possible shift change she would like in order that she could be with her husband, a heart patient. Davis returned word to her that Baker saw no reason why she could not change shifts and that when she got ready to come back to work to come to Bindery Superintendent Carter's office and discuss it with Carter. Davis corroborated Holmes.

On May 29, without warning of any sort or without any communication from Respondent that her absence was felt or that her presence was needed at the plant, Holmes was told by Respondent's counsel, Specht, and by James P. Campbell, vice president of manufacturing

that she was discharged.[4] It is not clear whether Respondent decided to terminate Holmes on May 16 and wrote her to this effect on May 19, but it is clear, and I find that she was told of her discharge on May 29.[5] In a different situation lack of a warning might not cause suspicions that a reason other than absenteeism was involved, but here Holmes was out on an excused leave of absence brought about by a tragedy.

The notice of discharge was given at the beginning of the collective bargaining session held on May 29, between the Union, represented by Murray McKinsey, Frank Thompson, Davis and Holmes, and the Company,

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[4] As for previous warnings, Holmes had been warned in January, some 5 months earlier not to be absent. I do not consider this bad-habit warning to relate to the excused absences to recover from deaths of her mother and son.

[5] Respondent moved to correct line 1, page 375 of the Transcript of Record which reads as follows:

"reported to work on the 18th then she would not have been dis-"

Respondent moved to correct this line by deleting the word "not," attaching to his motion affidavits of three witnesses at the trial (including the one testifying on page 375) to the effect that the correct testimony did not include the word "not." Further Respondent argued that the context of the record supported his motion.

In opposition to the Motion, the General Counsel provided an affidavit from the Court Reporter that the transcript accurately reflected his recordings, and Counsel for the Charging Party stated the record was correct providing affidavits from two witnesses to the trial agreeing that the record was correct. Apparently only a recollection was relied upon except in the case of the Reporter.

It so happens that the Trial Examiner keeps notes of testimony but not *verbatim et literaim*. His notes on this point read that the witness testified ". . . if she had reported on the 18th he would have discharged her." Further he cannot recall the word "not" being used in this. It is also the opinion of the Trial Examiner that the context of the record tends to support the Respondent's position and the Trial Examiner's notes. Accordingly, the record is found to be in error and Respondents' motion to delete the word "not" is hereby granted.

represented by Attorney Specht, William Bean and James Campbell. According to McKinsey, Specht called him into the hall at the beginning of the session and told him that he did not believe that Holmes should be in on the negotiating sessions because she was no longer an employee. McKinsey replied that Specht could not tell him who to put on his committee and that he was not going to ask Holmes to leave but was going to let her sit in on the session. They then went back into the meeting in the conference room where Specht made a statement to the effect that it was not anything personal but he wanted to let them know that Holmes had been discharged by the Company. Holmes stated that she had no notification to that effect and asked McKinsey if he knew of this. McKinsey said the first he had heard of it was in the hallway before the meeting. Holmes told Campbell that she had contacted her foreman, Baker, through Davis and that Baker had told her to come back to work when she got ready. She further stated that she had received no notification of the discharge. At this point according to McKinsey, Specht, Bean and Campbell conferred with one another following which Campbell made the statement that Holmes was discharged and would have the notice in the mail. Holmes stated that upon returning home at the conclusion of the negotiating session she found her notice of discharge in the mail.

Holmes' Union Activity

As has been noted earlier, Holmes had been discharged previously by the Respondent and had been reinstated pursuant to a Board order in May 1966. Following this action, in June 1968, the Union began an organizing campaign at Respondent's with Holmes

actively participating in the campaign. She passed out application cards for membership, talked to employees about the Union and attended meetings called by the Company prior to the election which was held on October 31, 1968. She attended about 3 meetings called by the Company with Vice President of Manufacturing Campbell presiding. Holmes stated that she carried a union contract book with her to the meetings and addressed herself to those present on union benefits in union contracts. After the Union won the election, Holmes was elected to membership on the Union's negotiating committee and attended three bargaining sessions. The first one she attended was held on April 11 (before her son's death on April 20). The second one, on May 15, was attended when she was on leave of absence, and when she attended the one on May 29 she was notified of her discharge. There was one other negotiating session on May 23, but Holmes had not attended it. As noted above, during this last period of absence she had talked to her foreman telling him that she was still nervous and upset and if they really did not need her she would like to have some more time. He told her to take her time in returning to work. Nothing was said to her at the May 15 negotiating meeting by Specht, Campbell or Bean with respect to her being on a leave of absence, yet being well enough to be present at the negotiating session. However, at the next negotiating session on May 23, which session Holmes did not attend, there was some conversation about Holmes' attending the May 15 negotiating session and yet having not reported to work and not working. Specht, at that time, stated to Union Representative Crunkleton that Respondent was upset about this and they were considering firing Holmes. This testimony

is credited and uncontradicted in the record. Crunkleton did not tell Holmes about this conversation.

Holmes' Absenteeism Record

There is no question but that Holmes had a record of excessive absenteeism. And there is no question but that absenteeism could be a cause for discharge even though it was excused absenteeism.

Discussion and Conclusions

Absenteeism, like tardiness is a disease the cure which is incentive, motivation and discipline. The most effective remedy for this disease is a joint effort to effect a cure made by the employer and the employee. But an employee can cure himself with considerable soul searching and honest appraisal. On the other hand, the remedy can be supplied solely by the employer with the fear of discharge being the motivating force. The witnesses in this case create a picture of a very friendly employer having a pleasant relationship with the employees. There is no question but that Foreman Baker had true concern for the welfare of Holmes and an appreciation of the soul shattering events from which she suffered: first on March 13 with the news of her mother's unexpected death and a month later on April 20 with the news of her son's death in the automobile accident. The further credited evidence is that Baker had told her to take her time and had even discussed a possible shift change for her with employee Davis. It strains credulity under these circumstances to believe that Respondent would discharge this employee for excessive absenteeism without first warning her or asking her if she was ready to come back to work.

These two periods of absenteeism were caused not by bad habits or sham or frivolous reasons but by tragic events in her life which tragic events were understood and appreciated by her foreman.

It is understandable that an employer might consider discharging an employee and discharged her for being untrustworthy when he saw her engaging in nerve racking work during a period of time in which she was supposed to be recovering from a nervous and emotional shock. But Holmes was not discharged for being untrustworthy. It seems to me the key to this case lies in the fact that Respondent became upset because Holmes participated with the Union in the negotiating meeting on May 15. Thus it would seem that her union activities, which are protected under the Act, sparked the very idea that Holmes should be discharged. The reason given for discharge was that she had been excessively absent. It is noted that her foreman Baker did not appear to be concerned with her excessive absenteeism. Apparently overlooked was the fact that she had been excused from work for time necessary to pull herself together so that she could work. Possible reasonable grounds for discharge would have been that she was untrustworthy in that by attending a union negotiating meeting she was belying the need for time to recover from shock. I find that Respondent seized upon excessive absenteeism as a pretext to discharge this known union adherent for her union activities. This case follows the long line of precedence standing for the proposition that it is "not whether there existed a valid ground for discharge, but whether the stated ground was the real one. '*J. P. Stevens & Co. v. N.L.R.B.*, 380 F.2d 292, 300 (C.A. 2,

1967).' " *N.L.R.B. v Ulbrich Stainless Steels, Inc.*, 398 F.2d 871, 872 (C.A. 2, 1968).[6]

The Date of the Discharge

Respondent maintains that Holmes was discharged on May 19 following her failure to report to work on May 18. As noted earlier this discharge had not been transmitted to Holmes and the exhibits of Respondent show that as late as May 25 Holmes had been marked down as having been absent from work. The Company representative, testifying as to this notation, had no reason to offer as to why he had made the notation yet the Respondent was contending that she had been fired a week earlier on the 19th. Under these circumstances and the circumstances taking place as they did on May 29, I conclude that the discharge took place on May 29, 1969.

Conclusions of Law

1. By discharging employee Rosa R. Holmes because of her participating in the union negotiating meeting on May 5, Respondent violated Section 8(a)(3) of the Act because this discharge tends to discourage union participation of its employees, a right protected under the Act.

2. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

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[6] In the *Ulbrich* case, discharges of three employees for alleged poor attendance records were found to be Section 8(a)(3) and (1) discharges for union organizing activity by the discharged employees.

3. These unfair labor practices effect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

It will be recommended that Respondent:

1. Cease and desist from its unfair labor practices.

2. Offer to reinstate employee Holmes with backpay from the time of discharge, the backpay to be computed on a quarterly basis as set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), approved in *N.L.R.B. v. 7-Up Bottling Co.*, 344 (1953), with interest at six percent per annum, as provided in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962) approved in *Philip Carey Mfg. Co. v. N.L.R.B.*, 331 F.2d 720 (C.A.6, 1964), cert. denied 379 U.S. 888, and

3. Post the notices provided for herein.

Because the Respondent by its conduct violated fundamental employee rights guaranteed by Section 7 of the Act, and because a discriminatory discharge in violation of Section 8(a)(3) of the Act strikes at the very heart of the Act (*Entwistle Mfg. Co. v. N.L.R.B.*, 120 F.2d 532, 536 (C.A. 4), it will be recommended that Respondent cease and desist from infringing in any manner with the rights guaranteed by Section 7 of the Act.

RECOMMENDED ORDER

Upon the foregoing findings and conclusions, and upon the entire record, I recommend that Respondent, its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against any employee engaged in activity on behalf of

Atlanta Bookbinders' and Binderywomen's Union, AFL-CIO, Local 96, or any other labor organization.

(b) In any other manner, interfering with, restraining, or coercing its employees in the exercise of their right guaranteed in Section 7 of the Act to form, join, or assist the above-named or any other labor organization and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid, or to refrain from any or all such activities.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act.

(a) Offer to employee Rosa R. Holmes, immediate and full reinstatement to her former job, or, if the job no longer exists, to a substantially equivalent position without prejudice to her seniority or other rights and privileges, and make her whole, in the manner set forth in the section of this decision entitled "The Remedy," for any loss of earnings she may have suffered as a result of her discharge on May 29, 1969.

(b) Preserve and, upon request, make available to the Board and its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary or appropriate to ascertain the backpay due under the terms of this Recommended Order.

(c) Post in its establishment at Atlanta, Georgia, copies of the attached notice marked "Appendix."[7]

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[7] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, recommendations, and Recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, con-

Immediately upon receipt of copies of said notice, on forms to be provided by the Regional Director for the Tenth Region (Atlanta, Georgia), the Respondent shall cause the copies to be signed by one of its authorized representatives and posted, the posted copies to be maintained for a period of sixty consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced or covered by any other material.

(d) Notify the Regional Director for the Tenth Region, in writing, within twenty days from the date of the receipt of this Decision, what steps the Respondent has taken to comply therewith.[8]

Dated at Washington, D.C. May 15, 1970.

/s/ George L. Powell

Trial Examiner

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clusions and order, and all objections thereto shall be deemed waived for all purposes. In the event that the Board's Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

[8] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify said Regional Director in writing, within ten days from the date of this Order what steps Respondent has taken to comply herewith."

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

AFTER A TRIAL IN WHICH ALL SIDES HAD THE OPPORTUNITY TO PRESENT THEIR EVIDENCE, THE NATIONAL LABOR RELATIONS BOARD HAS FOUND THAT WE VIOLATED THE LAW AND HAS ORDERED US TO POST THIS NOTICE, AND WE INTEND TO CARRY OUT THE ORDER OF THE BOARD AND ABIDE BY THE FOLLOWING:

WE WILL NOT fire you because you favor, or join, or are active for a union.

WE WILL NOT fire you because you participated on the union negotiating committee.

WE WILL NOT, in any other manner, discriminate against you to discourage your membership in the labor union, or interfere with your right to join, assist or be represented by a labor union, or interfere with any of your rights of self-organization and mutual aid guaranteed by Section 7 of the National Labor Relations Act.

Since the Board found that we fired Rosa R. Holmes on May 29, 1969, because she participated in the work of the Union's negotiating committee.

WE WILL offer her her old job back and give her backpay.

Each of you is free to become or remain or refrain from becoming or remaining a member of any labor union.

W. R. BEAN & SON, INC.
(Employer)

Dated ..... By .....
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this Notice or compliance with its provisions, may be directed to the Board's Office, Peachtree Building, Room 701, 730 Peachtree Street, NE, Atlanta, Georgia 30308 (Tel. No. (404) 526-5760).

APPENDIX "D"

Regulation Involved

NATIONAL LABOR RELATIONS BOARD
Rules and Regulations
(29 C.F.R. §§ 102.30-102.32)
WITNESSES, DEPOSITIONS, AND SUBPENAS

SEC. 102.30 *Examination of witnesses; depositions.* —Witnesses shall be examined orally under oath, except that for good cause shown after the issuance of a complaint, testimony may be taken by deposition.

(a) Applications to take depositions shall be in writing setting forth the reasons why such depositions should be taken, the name and post office address of the witness, the matters concerning which it is expected the witness will testify, and the time and place proposed for the taking of the deposition, together with the name and address of the person before whom it is desired that the deposition be taken (for the purposes of this section hereinafter referred to as the officer). Such application shall be made to the regional director prior to the hearing, and to the trial examiner during and subsequent to the hearing but before transfer of the case to the Board pursuant to section 102.45 or section 102.50. Such application shall be served on the regional director or the trial examiner, as the case may be, and on all other parties, not less than 7 days (when the deposition is to be taken within the continental United States) and 15 days (if the deposition is to be taken elsewhere) prior to the time when it is desired that the deposition be taken. The regional director or trial examiner, as the case may be, shall upon receipt of the application, if in his discretion good cause has been shown, make

and serve on the parties an order which will specify the name of the witness whose deposition is to be taken and the time, the place, and the designation of the officer before whom the witness is to testify, who may or may not be the same officer as that specified in the application. Such order shall be served on all the other parties by the regional director or on all parties by the trial examiner.

(b) Such deposition may be taken before any officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, including any agent of the Board authorized to administer oaths. If the examination is held in a foreign country, it may be taken before any secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States.

(c) At the time and place specified in said order the officer designated to take such deposition shall permit the witness to be examined and cross-examined under oath by all the parties appearing, and his testimony shall be reduced to typewriting by the officer or under his direction. All objections to questions or evidence shall be deemed waived unless made at the examination. The officer shall not have power to rule upon any objections but he shall note them upon the deposition. The testimony shall be subscribed by the witness in the presence of the officer who shall attach his certificate stating that the witness was duly sworn by him, that the deposition is a true record of the testimony and exhibits given by the witness, and that said officer is not of counsel or attorney to any of the parties nor interested in the event of the proceeding or investigation. If the deposition is not signed by the witness because he

is ill, dead, cannot be found, or refuses to sign it, such fact shall be included in the certificate of the officer and the deposition may then be used as fully as though signed. The officer shall immediately deliver an original and two copies of said transcript, together with his certificate, in person or by registered mail to the regional director or the trial examiner, care of the chief trial examiner in Washington, D.C., or associate chief trial examiner, San Francisco, California, as the case may be.

(d) The trial examiner shall rule upon the admissibility of the deposition or any part thereof.

(e) All errors or irregularities in compliance with the provisions of this section shall be deemed waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is or, with due diligence, might have been ascertained.

(f) If the parties so stipulate in writing, depositions may be taken before any person at any time or place, upon any peace and in any manner, and when so taken may be used like other depositions.

SEC. 102.31 *Issuance of subpenas; petitions to revoke subpenas; right to inspect or copy data.*—(a) Any member of the Board shall, on the written application of any party, forthwith issue subpenas requiring the attendance and testimony of witnesses and the production of any evidence, including books, records, correspondence, or documents, in their possession or under their control. Applications for subpenas, if filed prior to the hearing, shall be filed with the regional director. Applications for subpenas filed during the hearing

hall be filed with the trial examiner. Either the regional director or the trial examiner, as the case may be, shall grant the application on behalf of any member of the Board. Applications for subpenas may be made *ex parte*. The subpena shall show on its face the name and address of the party at whose request the subpena was issued.

(b) Any person served with a subpena, whether *ad testificandum* or *duces tecum*, if he does not intend to comply with the subpena, shall, within 5 days after the date of service of the subpena upon him, petition in writing to revoke the subpena. All petitions to revoke subpenas shall be served on the party at whose request the subpena was issued. Such petition to revoke, if made prior to the hearing, shall be filed with the regional director and the regional director shall refer the petition to the trial examiner or the Board for ruling. Petitions to revoke subpenas filed during the hearings shall be filed with the trial examiner. Notice of the filing of petitions to revoke shall be promptly given by the regional director or the trial examiner, as the case may be, to the party at whose request the subpena was issued. The trial examiner or the Board, as the case may be, shall revoke the subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpena does not describe with sufficient particularity the evidence whose production is required, or if for any other reason sufficient in law the subpena is otherwise invalid. The trial examiner or the Board, as the case may be, shall make a simple statement of procedural or other grounds for the ruling on the petition to revoke. The petition to revoke, any an-

swer filed thereto, and any ruling thereon shall not become part of the official record except upon the request of the party aggrieved by the ruling.

(c) Persons compelled to submit data or evidence at a public proceeding are entitled to retain or, on payment of lawfully prescribed costs, to procure copies or transcripts of the data or evidence submitted by them. Persons compelled to submit data or evidence in the non-public investigative stages of proceedings may, for good cause, be limited by the regional director to inspection of the official transcript of their testimony, but shall be entitled to make copies of documentary evidence or exhibits which they have produced.

(d) Upon failure of any person to comply with a subpena issued upon the request of a private party, the general counsel shall, in the name of the Board but on relation of such private party, institute proceedings in the appropriate district court for the enforcement thereof, unless in the judgment of the Board the enforcement of such subpena would be inconsistent with law and with the policies of the act. Neither the general counsel nor the Board shall be deemed thereby to have assumed responsibility for the effective prosecution of the same before the court.

SEC. 102.32. *Payment of witness fees and mileage; fees of persons taking depositions.*—Witnesses summoned before the trial examiner shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States. Witness fees and mileage shall be paid by the party at whose in-

stance the witnesses appear and the person taking the deposition shall be paid by the party at whose instance the deposition is taken.

APPENDIX "E"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-1417
Summary Calendar*

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

—v.—

W. R. BEAN & SON, INC.,
Respondent.

APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD (GEORGIA CASE)

(January 12, 1972)

ON PETITION FOR REHEARING

Before GEWIN, GOLDBERG and DYER,
Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.